



University of Groningen

Final Dispute Resolution by Dutch Administrative Courts

de Graaf, K.J.; Marseille, A.T.

Published in:
On Judicial and Quasi-Judicial Independence

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2013

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

de Graaf, K. J., & Marseille, A. T. (2013). Final Dispute Resolution by Dutch Administrative Courts: Slippery Slope and Efficient Remedy. In S. Comtois, & K. J. de Graaf (Eds.), *On Judicial and Quasi-Judicial Independence* (pp. 205-218). (Governance & Recht; No. 7). Den Haag: Eleven International Publishing.

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Final Dispute Resolution by Dutch Administrative Courts: Slippery Slope and Efficient Remedy

*Kars de Graaf and Albert Marseille**

1. Introduction

Dutch administrative authorities are competent in a number of fields to decide on the legal position of citizens, either in response to an application or *ex officio*. Sometimes the legislator grants discretionary power to a public authority and sometimes the law leaves no room to balance the interests involved. In most cases the decision-making process will lead to a decision that is potentially the subject of judicial review by an administrative court. The classic role of administrative courts is simply to assess the lawfulness of the decision taken. The judgment entails either the statement that the challenged decision is lawful, or the annulment of the challenged decision. If the latter is the case, the public authority will have to decide on the matter again at a later date. At least until that date, there is no final resolution to the dispute.

The courts are independent and impartial with regard to administration in the classical ‘separation of powers’ sense. The call for final dispute resolution within a reasonable time however calls for effective and efficient administrative adjudication and demands of courts that they direct the plaintiff and the public authority towards a final resolution of their conflict. A simple annulment of the decision by the court is no longer sufficient. Ideally the procedure will end with clarity on the legal position of both parties. This means that it is clear which decision of the public authority applies in the future.¹ If the contested decision is upheld by the court, the decision that applies in the future is of course the contested decision. But what if the contested decision is annulled? The Dutch General Administrative Law Act (GALA) under certain conditions grants administrative courts the power to bring about the final settlement of the dispute even when the contested decision is annulled.

* Dr. K.J. de Graaf is Associate Professor of administrative and environmental law at the University of Groningen, the Netherlands. Prof. dr. A.T. Marseille is Professor in Empirical Studies of Administrative Law at Tilburg University, the Netherlands. They thank Derek Sietes and Jasper Wesselman for their help in preparing this chapter.

¹ B.J. Schueler, J.K. Drewes et al., *Definitieve geschilbeslechting door de bestuursrechter*, Boom Juridische uitgevers, The Hague, 2007.

This chapter deals with the question of how much effort administrative courts should invest in final dispute resolution and how the use of the powers to bring about final dispute resolution relates to the classic ideas of independence and impartiality and the relationship between administrative courts and administration. To that end, we discuss recent amendments in the GALA that provide courts with more effective instruments and powers to bring about final dispute resolution and case law that proves courts either too careful or surprisingly careless. This chapter is divided into three parts. First, we will explain what the powers of the courts to bring about the final settlement of the dispute imply. Second, we will examine the extent to which those powers are used. Third, we will show the criteria the courts apply when deciding whether they should use these powers in their quest for the efficient offer of effective remedies. We will indicate the limitations of the courts' powers and show that Dutch case law is in some respects moving towards a 'slippery slope'.

2. The Powers of the Court to Bring about Final Dispute Resolution

When an administrative court in the Netherlands comes to the conclusion that the contested decision of a public authority is unlawful and has to be annulled, it has three instruments to prevent the dispute between the parties from continuing while the citizen waits for a new decision by the public authority. These powers are awarded to the courts in Article 8:72 and Article 8:51a GALA.

First, administrative courts can decide that the legal consequences of the annulled decision shall be allowed to stand (Article 8:72(3)(a) GALA). The court can use that power when it is certain that the defect can be repaired and the content of the repaired decision will be exactly the same as the contested decision.

For example,² before appealing to a court against a public authority's decision an objection usually has to be lodged against that decision. Before deciding on that objection, the interested parties have to be given the opportunity to be heard (Article 7:2 (1) GALA). When the public authority fails to meet this obligation and subsequently an appeal is lodged against the decision of the public authority on the objection, one of the grounds of that appeal can be that the public authority violated the law by not hearing the person that lodged the objection. The court will certainly award this ground and as a consequence, it will annul the contested decision. Subsequently, it has to decide whether the legal consequences of the annulled decision will be allowed to stand (Article 8:72(3)(a) GALA). There is a fair chance that the court will apply Article 8:72(3)(a) GALA. When the court concludes that in other respects the decision of the public authority is lawful, it is certain that the public authority will take exactly the same decision again. In that

2 This example was already given by government when the competence of the courts was introduced in the GALA in 1994, see E.J. Daalder, G.R.J. de Groot & J.M.E. Breugel, *De parlementaire geschiedenis van de Algemene wet bestuursrecht. Tweede tranche*, Alphen a/d Rijn 1994, p. 470.

case it is more efficient that the court decides that the legal consequences of the annulled decision will be allowed to stand.

Second, the court can determine that its judgment shall take the place of the annulled decision (Article 8:72(3)(b) GALA). The court can only use that power when it is certain which decision the public authority should take to replace the decision that it annulled. Because it is clear which decision has to be taken instead, the court has the power ‘to step into the shoes’ of the public authority, and to decide the matter in a lawful manner instead of the public authority. The court has this power because it is deemed to be inefficient for the public authority to take a new decision when it is crystal clear what the content of the decision will be. In such a situation, it is far more efficient for the court to take the decision – by determining that its judgment will take the place of the annulled decision – instead of prescribing that the public authority take a new decision.

For example,³ when a public authority decides that an objection is unfounded and the court has to give judgment concerning the appeal against that decision, the court can conclude that the objection should have been declared inadmissible. The court will of course annul the public authority’s decision. Because there can be no discussion regarding the decision the public authority will have to take after the annulment (the objection will have to be declared inadmissible), the court will decide that its judgment shall take the place of the annulled decision and will decide that the objection is inadmissible.

A third, relatively new power of the court is that it can allow the public authority the opportunity to repair shortcomings or unlawful elements that the court found in the contested decision; in Dutch this procedure is called a *bestuurlijke lus*, an administrative loop. This power is not mentioned in Article 8:72 GALA, but in Article 8:51a GALA. If the court uses this power, it will state in a specific, interim judgment that it has found unlawful elements in the contested decision and that it will annul the decision in its final judgment. Until the final judgment the court will however award the public authority time to try and repair the unlawful elements. The public authority’s response to the administrative court of first instance could be that it doesn’t agree with the assessment of the court and that there is no need to repair any unlawful element. The public authority could also respond either by offering further information or giving improved reasons for the contested decision or it could take a new decision that will be added to what is subject to judicial review by the court. The court can use the power to allow the public authority an opportunity to repair the decision any time it concludes that the contested decision is unlawful and it argues that allowing the public authority that opportunity could be efficient for reaching a final resolution to the dispute. The court is supposed to use the power in situations where it fears that if it does not take control over the settlement of the dispute, the decision-making process

3 See E.J. Daalder, G.R.J. de Groot & J.M.E. Breugel, *De parlementaire geschiedenis van de Algemene wet bestuursrecht. Tweede tranche*, Alphen a/d Rijn 1994, p. 470.

necessary for the new decision by the public authority will take too much time. This power was introduced in 2010 in order to reiterate the notion that administrative courts have a responsibility for final dispute resolution.

The Dutch legislator is keen to support the idea that administrative courts have an important role to play in finding ways to stimulate final dispute resolution. On January 1st 2013 it introduced a new relevant article in that respect. Article 8:41a GALA states that administrative courts will resolve the dispute of the parties where possible.

3. Empirical Data: the Use of the Powers to Bring about Final Dispute Resolution

How often do administrative courts make use of their powers to bring about final dispute resolution? To answer this question, we will compare court activity in 2012 with activity in 2007. The years between 2007 and 2012 ushered in two important developments. In the first place, the administrative courts were provided with additional powers (the administrative loop) to try to bring about the final resolution of the dispute, as we have seen in section 2. In addition, since 2008 the case law of the highest administrative courts indicates that courts are able to use their powers of Article 8:72 GALA in increasingly different situations, as will be explained in section 4.

Ideally, we would have looked at the activities of the courts of first instance. After all, if an administrative judge has to decide whether he will use one of his powers to (attempt to) bring about the final settlement of the dispute, it will most likely be a judge in first instance. Research that concerns their decisions can provide us with valuable insights into the effects of the expanded powers of the administrative courts. However, courts in first instance do not publish all their judgments, so it is somewhat difficult to obtain the necessary information concerning their use of these powers. As a consequence, we turned to the two most important Dutch courts of last resort, the Administrative Jurisdiction Division of the Council of State (Council of State) and the Central Appeals Court for Public Service and Social Security Matters (Central Appeals Court), because they publish all their judgments.⁴

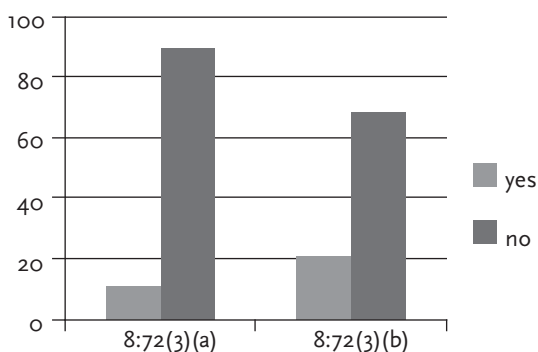
We have analysed a sample of their judgments where they conclude that a decision given by a public authority is unlawful and they therefore have to decide whether it is possible to (attempt to) bring about final dispute resolution, by using their powers of Article 8:72 or Article 8:51a GALA.

4 Council of State: <www.raadvanstate.nl>. Central Appeals Court: <www.rechtspraak.nl>.

Our sample consists of 374 decisions given by these two courts, 200 from the Council of State (101 from 2007, 99 from 2012),⁵ 215 from the Central Appeals Court (115 from 2007, 100 from 2012).⁶

We will first focus on the Council of State. We distinguish three different decisions. The first decision that has to be taken when the Council of State concludes that an administrative body's decision must be annulled, is whether it is possible to allow the legal consequences to stand (Article 8:72(3) GALA). If that is not possible, the next decision is whether it is possible to let the courts judgment take the place of the annulled decision (Article 8:72(4) GALA). If that is not possible either, the Council of State has to finally decide whether it will try to bring about the final resolution of the dispute by using the so-called administrative loop (Article 8:51a GALA). In 2007, the administrative courts did not have the power to take this last decision, because Article 8:51a was implemented in 2010.

The first figure shows the results of the two subsequent decisions the Council of State had to take in 2007 when it concludes that a public authority's decision must be annulled.

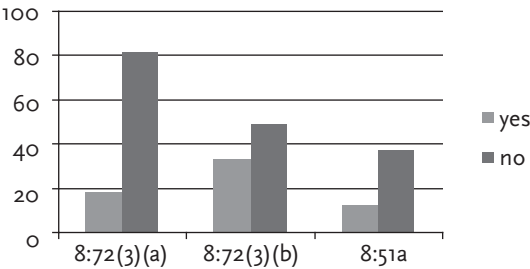


The figure shows that in 11 of 100 cases, the Council of State decided to allow the legal consequences of the annulled decision to stand (the two columns on the left). With regard to the remaining 89 cases, it decided in 21 cases that its judgment should take the place of the annulled decision (the two columns on the right). As a consequence, in 68 of 100 cases in which the contested decision had to be annulled, the Council of State did not succeed in bringing about final dispute resolution.

⁵ We excluded the procedures concerning immigration.

⁶ We started our search with decisions published at the end of April, and went subsequently a week ahead and a week back, until we had collected more than 100 decisions from both courts. As a consequence of a more detailed analysis some of them were omitted.

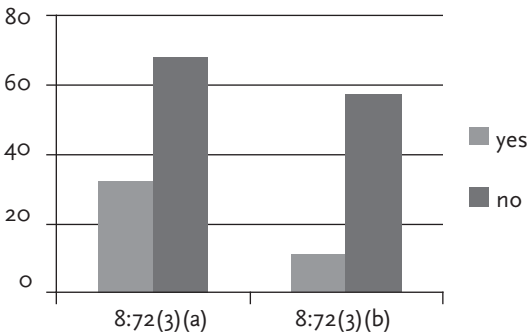
The next figure shows the results of the three subsequent decisions the Council of State had to take in 2012.



The figure shows that in 18 of the 100 cases, the Council of State decided to allow the legal consequences to stand (the two columns on the left). With regard to the remaining 82 cases (the two columns in the middle), it decided in 33 of them that its judgment shall take the place of the annulled decision. With regard to the remaining 49 cases (the two columns on the right), the Council of State decided to use the administrative loop in 23 cases. As a consequence, in 37 of the 100 cases in which the contested decision had to be annulled, the Council of State was not able to bring about the final settlement of the dispute.

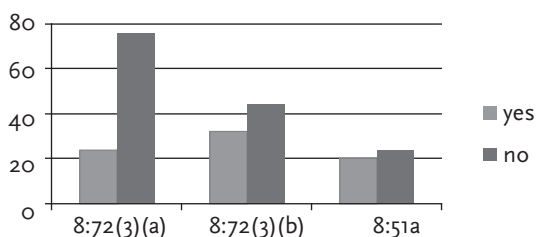
When we compare the 2007 cases with those from 2012, we see an increase in the final settlement of disputes where the Council of State concluded that the contested decision had to be annulled from 32% to 63% of cases. The reason for this increase is not only the introduction of the administrative loop but also an increased use of the two remaining instruments on behalf of the final settlement of the dispute.

If we now switch to the Central Appeals Court, the first figure shows the results of the two subsequent decisions the Central Appeals Court had to take in 2007 when it concluded that an administrative body’s decision had to be annulled.



The figure shows that in 32 of 100 cases, the Central Appeals Court decided to allow the legal consequences of the annulled decision to stand (the two columns on the left). With regard to the remaining 68 cases (the two columns on the right), it decided that its judgment should take the place of the annulled decision in 11 cases. As a consequence, in 57 of 100 cases where the contested decision had to be annulled, the Central Appeals Court didn't succeed in bringing about the final settlement of the dispute.

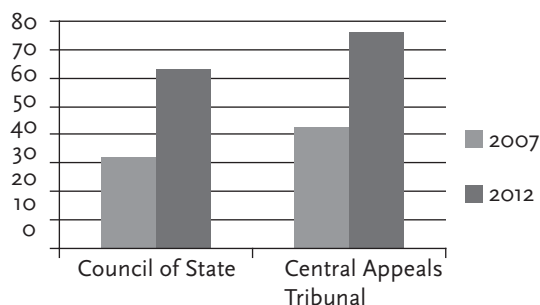
The next figure shows the results of the three subsequent decisions the Central Appeals Court had to take in 2012.



The figure shows that in 24 of 100 cases, the Central Appeals Court decided to allow the legal consequences to stand (the two columns on the left). With regard to the remaining 76 cases (the two columns in the middle), it decided that its judgment should take the place of the annulled decision in 32 cases. With regard to the remaining 44 cases (the two columns on the right), the Central Appeals Court decided to use the administrative loop in 20 cases. As a consequence, only in 24 of 100 cases in which the contested decision had to be annulled, did the Central Appeals Court not succeed in bringing about final dispute resolution, only in 76 did it succeed.

When we compare the figure for 2007 with the one for 2012, we see a significant increase in the number of cases where the Council of State and the Central Appeals Court reach a final settlement for the dispute. The increase is caused partly by the use of the administrative loop but also by an increased use of the powers of Article 8:72 GALA.

When we compare the Council of State with the Central Appeals Court, we observe that the Central Appeals Court used its powers to bring about the final settlement of the dispute in 2007 more frequently than the Council of State did.



Moreover, the increase of the use of these powers (that can be observed in both courts) is more so by the Central Appeals Court than by the Council of State. The most striking difference between the two courts can be observed when we compare their decision concerning the use of the administrative loop. When they conclude that they cannot use the powers of Article 8:72 GALA (in 2012 at the Council of State in 49% of cases and at the Central Appeals Court in 44% of cases), the Central Appeals Court decides in almost half of the cases to use the administrative loop, the Council of State only in one in five cases.

So we can conclude that these two Dutch administrative courts in last instance increasingly make use of their powers to (attempt to) bring about the final resolution of the dispute but that the extent to which they use their powers differs.

What about the district courts? As earlier indicated, their judgement was not investigated. However, other research in recent years suggests that these courts also make more use of their powers to try to bring about final dispute settlement.⁷

4. The Increased Use Explained and Analysed

The figures presented in section 3 paint a clear picture. The percentage of cases where the courts have tried to bring about final dispute resolution has increased in recent years. Although we should emphasise that this development is a reaction to complaints regarding the functioning of the system of administrative jurisdiction

7 P.A. Willemsen, M.C.J. Busscher, N. Groot, P.M. Langbroek & I.L.A. Langerak, Final dispute settlement in numbers. Report of an examination of final dispute settlement in the Utrecht district court, *Transylvanian Review of Administrative Sciences*, 2009, no. 28E, p. 129-146; A.T. Marseille & R.R. van der Heide, De onderbenutting van de mogelijkheden tot finale beslechting door de bestuursrechter, *JBplus* 2008, No. 2, p. 78-92; B.J. Schueler, J.K. Drewes *et al.*, *Definitieve geschilbeslechting door de bestuursrechter*, Boom Juridische uitgevers, The Hague 2007; K.A. van der Veer & A.T. Marseille, Besluitvorming na een rechterlijke vernietiging: de achilleshiel van het bestuursrecht, *NJB* 2006, p. 2168-2175; P.A. Willemsen *et al.*, Definitieve geschilbeslechting becijferd, *JBplus*, 2010/1, p. 32-48.

in the Netherlands, it also raises some questions. The first question in relation to the numbers presented would be: what triggered the increase?

The answer to that question actually seems simple. First, as of 2010 administrative judges have an additional instrument to try to bring about final dispute resolution: the administrative loop. Second, as of 2008 the case law of the highest administrative courts in the Netherlands has contributed to the increase in the percentage of cases where the courts have put effort into bringing about final dispute resolution. The highest courts have emphasised the role of the courts on this issue. Until 2008, their case law indicated that courts could only use the powers mentioned in section 2 in cases where the public authority does not have a choice when it comes to decision-making once the contested decision has been annulled. Usually the case law would indicate that using these powers – either to determine that the legal consequences of the annulled decision shall be allowed to stand (Article 8:72(3) GALA) or to determine that the judgment shall take the place of the annulled decision (Article 8:72(4) GALA) – is allowed only in cases where the outcome of the new decision-making process is evident and crystal clear. The use of the powers was restricted to situations where only one lawful decision (that should be taken by the public authority) remained and that it is just a matter of efficiency to have the court use these powers.⁸ However, in its judgment of the 10th of December 2008⁹ the Administrative Jurisdiction Division of the Council of State deviated from this existing case law.

The disputed decision concerned the installation of a traffic sign in a small village called Hattem in the Netherlands. The legislator had granted the public authority wide discretion for taking this decision. The Council of State's judgement has two important aspects.

The Council of State found the lodged appeal well-founded and had decided that it would annul the contested decision. It then explicitly considered that 'when a court decides to annul the contested decision, it ought to assess all possibilities of final dispute resolution, such as the use of the powers awarded in Article 8:72 paragraph 3 and 4 of the General Administrative Law Act'. This meant a drastic change in the way courts were to consider their role in bringing about final dispute resolution. This is the first aspect that is of importance for answering the question of the expanded use of the competences. There is however, an even more important reason. The Council of State furthermore explicitly changed the existing boundaries that courts had used until then to assess whether or not they would use the powers mentioned in Article 8:72 GALA. To bring about final dispute resolution, it considered that from now on the use of the discretionary powers was not restricted to situations where only one lawful decision remains to be taken. The reason: efficiency and effectiveness of administrative jurisdiction.

8 See as an example Administrative Jurisdiction Division of the Council of State 28 June 1999, *JB* 1999/196.

9 Administrative Jurisdiction Division of the Council of State 8 December 2008, *JB* 2009/39.

The Council of State also referred to the independence of the administrative court by mentioning the separation of powers. It stated that issues of discretion would remain in the hands of the public authority and that the court would only be facilitating the efficient bringing about of final dispute resolution. Still, this change in the case law is relevant and important.

This judgment and others that were published later,¹⁰ are examples of the new case law on the use of the powers of the court to bring about final dispute resolution. The new Article 8:41a of the GALA, which encourages administrative courts to put more effort into bringing about final dispute resolution, can be considered a sign of support for this new application of the powers of the court. However, the case law has triggered other, more fundamental questions. Should the court be in charge of final dispute resolution between the parties? What should be the exact role of the court in trying to bring about final dispute resolution? How much effort, time and money should courts invest in trying to achieve final dispute resolution? This is to a large extent unclear.

One of the important issues that remains concerns the discretion awarded to the public authority by the legislator. How will courts deal with the existence of discretion for the public authority on the one hand and the obligation to assess the possibilities of final dispute resolution on the other? In what way is it ensured that the courts do not intervene with the powers of the public authority? These questions are important as far as the separation of powers is concerned but also relate to the judicial independence and the impartiality of the courts. Another issue that courts are confronted with is that final dispute resolution often requires further investigation into the relevant facts. However, the courts do not hold the primary responsibility for gathering and establishing the facts that will lead to a lawful decision. It is the public authorities that are best equipped to undertake the investigation and renew the contested decision. These issues suggest that it is not always for administrative courts to bring about final dispute resolution. Public authorities have power and means to do so. The relatively new instrument of course, reflects this idea: the administrative loop (Article 8:51a GALA). The legislator introduced this instrument assuming it would be helpful in bringing about final dispute resolution while guaranteeing the independence of the administrative courts and the separation of powers. The task of the administrative court remains to simply evaluate the legality of a contested decision. The administrative loop does not have any influence on the power of the public authority to decide on the rights and duties of the applicant.

Effective remedy

There are disputes in Dutch administrative law where administrative courts are generally considered suitable for bringing final dispute resolution about.

¹⁰ See for example Administrative Jurisdiction Division of the Council of State 11 February 2009, AB 2009/224.

The General Administrative Law Act explicitly demands a final judgment in cases that concern administrative (punitive) fines. Article 8:72a GALA states: “When a decision to impose an administrative fine is annulled by the court, it shall order that the judgment shall take the place of the annulled decision.” The reason for this mandatory use of the power to decide that the judgment will replace the annulled decision is said to lie in Article 6 of the European Convention on Human Rights (ECHR) which demands final dispute resolution within reasonable time in cases concerning criminal charges, such as an administrative fine. Article 6 ECHR furthermore demands full jurisdiction by the court in establishing the facts of the case, in determining the culpability of the offender and in assessing how severe the sanction should be to be appropriate.

In cases of government liability for decisions that were annulled by the court and were thus proven unlawful, the Dutch legislator has recently proposed a special procedure for citizens requesting damages. The essence of this special track is essentially a direct request to the administrative court to award damages contrary to the appeal procedure that is normally lodged against a decision by a public authority.¹¹ Most authors in the Netherlands argue that nothing should stand in the way of final dispute resolution in these kinds of disputes on (fault) liability of the government. The legislator has therefore devised a special request procedure that has to end with a judgment by the administrative court determining the exact liability of the government.

Slippery slope?

For some disputes it is not clear whether administrative courts should have the obligation to reach final dispute resolution. Strangely enough the Dutch legislator did not propose a special procedure for disputes that involve the no-fault liability of public authorities for lawful decisions. Disputes concerning the no-fault liability of public authorities will have to be brought to court by lodging an appeal against a decision of the public authority concerning its own (no-fault) liability.¹² The administrative court will annul the decision when it is unlawful. The court then has to assess the possibilities for final dispute resolution. Although the administrative court is not obliged to achieve final dispute resolution, most authors trust that courts will in general lead the procedure to a judgment on the exact no-fault liability of the public authority.¹³ The court could however, refer the case to the public authority to decide in the matter again. Some authors and case law state that it is up to the public authority to establish the facts and when that duty of care is not properly upheld, the court should refer the case to the public authority. Other authors claim that the issue of awarding damages for no-fault liability is, to a certain extent, at the discretion of the public authority and therefore the courts should not be obliged to determine that the judgment will take the place of

11 See *Parliamentary Papers II* 2010/11, 32 621, nr. 2 (proposed Article 8:88 GALA).

12 See *Parliamentary Papers II* 2010/11, 32 621, nr. 2 (proposed Article 4:126 GALA)

13 See B.J. van Ettekovén & R. Ortleip, *Zelf in de zaak voorzien en schadevergoeding*, *O&A* 2012, p. 2-18

the annulled decision.¹⁴ Until recently there was no case law clarifying this issue. Only recently has the Administrative Jurisdiction Division of the Council of State seemingly accepted that there is indeed discretion for public authorities in these kind of cases.¹⁵

The most difficulty we have is with the disputes where it is questionable whether the courts are allowed to use their powers to bring about final dispute resolution. We can explain this by giving two examples of somewhat older court judgments.

‘Three strikes and you’re out’. These words summed up the main idea in a judgment handed down by the district court in Amsterdam in 1998.¹⁶ It decided in a case where the public authority had not provided proper reasons for refusing a subsidy to a zoo three times in a row. Once the court had annulled the decision refusing the subsidy three times, it then decided that it would grant the subsidy by deciding that its judgment should take the place of the annulled decision. It did so by stating that the public authority would, in a potential future procedure, probably not be able to give proper reasons for another refusal. Although this case could be considered somewhat older and concerns a verdict by a district court, it can serve as an example of what the administrative courts deem appropriate when confronted with a public authority that gives poor reasons for a decision several times. There are other, more recent examples.¹⁷

‘No decision within a reasonable time and you are out’. A second example is provided by the District Court of the Hague that based its (unpublished) judgment on the idea that justice had to be delivered within reasonable time. In this case an appeal was lodged against a decision that concerned the reclaiming of disability benefits. The appeal was well-founded and the court considered that because of the long period it had taken the public authority to reach a decision on reclaiming the disability benefits, the court was allowed to determine that its judgment should take the place of the annulled decision. It furthermore decided that the sum that was reclaimed had to be diminished by 10%.

We think that in both cases the question of whether or not the courts were allowed to use the powers of Article 8:72 GALA is worthy of discussion. Although it was presumably acceptable for the courts to decide that their judgments were to take the place of the annulled decisions, we feel that in general there is only one sound reason to do so and that is the situation where only one lawful decision remains to be taken (by the public authority) and it is therefore a question of efficiency

¹⁴ See R.J.N. Schlössels, *Discretionaire aansprakelijkheidsrecht?*, in T. Barkhuysen, W. den Ouden & M.K.G. Tjepkema (eds.), *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiek*, Kluwer, Deventer, 2012, p. 36-39; also see M.K.G. Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel. Een onderzoek naar nationaal, Frans en Europees recht* (diss. Leyden), Kluwer, Deventer, 2010, p. 424.

¹⁵ Administrative Jurisdiction Division of the Council of State 5 December 2012, *JB* 2013/11.

¹⁶ District Court Amsterdam 16 April 1998, *JB* 1998/153.

¹⁷ See Central Appeals Court 24 September 2008, *AB* 2009/281.

that the court uses its powers. It is questionable whether this was the case in both disputes.

Against the judgment in the second example the public authority lodged an appeal and the higher court (the Central Appeals Court) decided that the district court had gone beyond its powers.¹⁸ In March 2012 the Administrative Jurisdiction Division of the Council of State seemingly recognised the point that we are trying to make here.¹⁹ It stated that when applying the power to decide that the judgment shall take the place of the annulled decision any administrative court should have come to the conclusion that the public authority would have come to the same decision and that this decision would be lawful. This new way of stating the possibilities to use the power to bring about final dispute resolution comes suspiciously close to the words of the government when introducing the powers: they should only be used when one lawful decision remains to be taken and using the powers is an efficient remedy. And should not be a first step towards a slippery slope.

5. Final Remarks

The emphasis that both society and the legislator put on final dispute resolution leads to a dilemma for administrative courts. The pressure on the courts to bring about final dispute resolution is increasing but they are not allowed to jeopardise the separation of administrative and judicial responsibilities based on the separation of powers doctrine. Interfering in the discretionary powers of the public authority could be a slippery slope. As a consequence, courts should be alert in their efforts to bring about final dispute resolution in administrative disputes and claim powers to do so. In any case in which an administrative court achieves final dispute resolution, it should be because of efficiency reasons and in situations in which either only one lawful decision remains to be taken or it is certain the public authority will take the same decision again, but now carefully prepared and – as a consequence – lawful. Emphasis on final dispute resolution should never be a reason to disregard or change the balance of the separation of powers. The courts' independence from the executive should be respected.

On the other hand one should not forget that in many cases the proceedings in court may be helpful to come to the conclusion that only one lawful decision remains to be taken. The courts have wide discretion in their efforts to reach the point where final dispute resolution by the courts is simply a matter of efficiency. The legislator has recently tried to create an incentive for the courts to try to settle all disputes where possible by implementing Article 8:41a GALA but it remains to be seen what the effects of this provision will be. So far it seems to have more of a symbolic function than creating real drive for the administrative courts to provide final dispute resolution. In addition, there is a growing awareness that

¹⁸ Central Appeals Court 7 June 2000, *JB* 2000/229.

¹⁹ Administrative Jurisdiction Division of the Council of State 21 March 2012, *AB* 2012/233.

public authorities are, for the most part, better equipped for achieving final dispute resolution than the courts. We should consider their expertise in establishing the facts and their powers in questions of policy. Only when it is more efficient and effective for the court to bring about final dispute resolution, rather than to leave it to the executive, should the courts be considered legitimate in their action and the courts independence from the executive is sufficiently guaranteed.